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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY NEWLAND,

Petitioner,

vs.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
MARITZA B. MESKAN
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

This case arises from a state where an unsuccessful petitioner in state habeas may seek review by filing a successive petition for an original writ in a higher court. This procedure raises the following questions:

1. Is any proceeding "pending" within the meaning of the federal habeas statute of limitations tolling provision, 28 U. S. C. § 2244(d)(2), during all or part of the interval between denial by the lower court and filing in the higher court?

2. If the answer to question 1 is yes, is there any limit on the time?

3. Does the answer to question 2 depend on an interpretation of the state court's disposition of the petition, *i.e.*, whether the state court rejected it as untimely, lacking in merit, or both?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

CJLF has for many years sought to limit the abuse of federal habeas corpus to delay the finality of valid judgments in criminal cases. In 1996, Congress enacted a comprehensive reform for this purpose, of which the new statute of limitations

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

was a key component. The decision in the present case, as subsequently expanded in *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001), mandate stayed Oct. 29, 2001, amounts to a partial judicial repeal of this statute. It gives petitioners unlimited time to delay between the stages of California collateral review. This result is directly contrary to the purpose of the statute and contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On April 3, 1990, Tony Saffold was convicted in California state court of murder, assault with a deadly weapon, and two counts of robbery, with findings of firearm use associated with the murder and robberies. J. A. 1. His conviction was affirmed, and the California Supreme Court denied review on April 15, 1992. *Ibid.* His conviction became "final," for present purposes, 90 days later, on July 14, 1992. See 28 U. S. C. § 2244(d)(1)(A) ("expiration of the time for seeking [direct] review"); Supreme Court Rule 13.1 (90 days).

Five years later, on April 17, 1997, Saffold delivered to prison authorities[2] his state petition for writ of habeas corpus for filing in the Superior Court of San Joaquin County. For prisoners like Saffold, whose conviction became final before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the one-year limitations period began running on April 24, 1996 and expired on April 24, 1997. See *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 257, 121 S. Ct. 2120, 2123 (2001) (noting Second Circuit holding to

2. *Amicus* assumes for the sake of argument that Saffold's declaration of his dates of delivery to prison authorities, J. A. 75-76, is true, and that the mailbox rule set forth in *Houston* v. *Lack*, 487 U. S. 266, 276 (1988) applies to state habeas petitions for the purpose of the tolling provision of the AEDPA. See *Saffold* v. *Newland*, 250 F. 3d 1262, 1268 (CA9 2001). Under this rule, Saffold's April 17 delivery of his petition to prison authorities, not the May 1 filing date, would commence tolling of the limitations period.

same effect).[3] His initial filing on April 17, 1997, stopped the limitations period from running just seven days before expiration. The Superior Court denied his petition on June 9, 1997. J. A. 2. On June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal, Third Appellate District. The Court of Appeal denied that petition on June 26, 1997. *Ibid.*

On November 13, 1997, after four and one-half months had passed, he filed an original petition for writ of habeas corpus in the California Supreme Court. Saffold contends he did not receive notice of the state Court of Appeal's denial until November 10, but the Ninth Circuit does not appear to have credited this claim, and its opinion proceeds on the premise that he "waited four and one-half months." *Saffold* v. *Newland*, 250 F. 3d 1262, 1265, and n. 3 (CA9 2001); see also App. to Pet. for Cert. F-4 (magistrate judge notes false statement in affidavit and warns Saffold of consequences of perjury). On May 27, 1998, the California Supreme Court denied review "on the merits and for lack of diligence." App. to Pet. for Cert. G-1.

On June 4, 1998, Saffold filed an application for writ of habeas corpus in the United States District Court, Eastern District of California. See J. A. 3. The Attorney General moved to dismiss on the ground that Saffold's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U. S. C. § 2244(d). See Pet. for Cert. 4.

The magistrate judge held that the statute "began to run again" after the Court of Appeal denied relief and had expired by the time Saffold filed in the California Supreme Court. App. to Pet. for Cert. F-5. The District Court adopted the findings and recommendations filed by the magistrate judge, granted petitioner's motion to dismiss, and ordered the case dismissed. App. to Pet. for Cert. E-2. The District Court issued a certifi-

3. The state did not seek review of the "grace period" holding in *Walker*, presumably because there was no division in the circuits on the point.

cate of appealability on the statute of limitations issue only. See App. to Pet. for Cert. D-1; 28 U. S. C. § 2253(c); Fed. Rule App. Proc. 22(b). The certificate does not mention any arguably meritorious underlying claims. It predates *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000).

The Ninth Circuit reversed, holding that Saffold's petition was within the limitations period. *Saffold*, 250 F. 3d, at 1266. In applying its ruling in *Nino* v. *Galaza*, 183 F. 3d 1003 (CA9 1999), it found that the District Court had erred by failing to toll the federal statute of limitation for the entire period from the initial filing in the Superior Court to the Supreme Court's dismissal. *Saffold*, *supra*, at 1265. On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc but amended its opinion. Pet. for Cert. 5; see App. to Pet. for Cert. C-1. This Court granted certiorari on October 15, 2001.

SUMMARY OF ARGUMENT

The central purpose of the statute of limitations for habeas cases was to move the cases along to finality by requiring the petitioner to initiate each stage of review within a reasonable time. The Ninth Circuit's rule of open-ended tolling between the stages of state collateral review would defeat that central purpose.

In California, there is no appeal from denial of habeas relief by the Superior Court, but the petitioner can file a successive petition in the Court of Appeal or Supreme Court. In the ordinary sense of the word, there is no proceeding "pending" in the interval between a nonappealable judgment and a successive petition. If any tolling rule to cover the gap is to be created, it would be a stretch of the language to cover a perceived necessity or implement an unexpressed intention of Congress. Any such stretching should be strictly limited to the necessity.

Whether a state court chooses to accept an untimely petition and decide it on the merits has no bearing on whether the federal statute of limitations clock was ticking in the interval preceding the filing of that petition. The statute of limitations is a federal rule enacted by Congress, and it has nothing to do with the doctrine of adequate and independent state grounds. The Ninth Circuit has imported a confused and problematic body of law into an area where it has no application.

In states where an unsuccessful collateral review petitioner has a fixed time to initiate review at the next level of state courts, the federal statute should remain tolled for that interval. Where there is no fixed interval for the particular procedure in state law, the federal courts should adopt the interval for the most closely analogous procedure that does have a fixed interval. In California, those intervals are 60 days to appeal a Superior Court judgment to the Court of Appeal and 10 days from finality to seek Supreme Court review of a Court of Appeal decision. Habeas petitioners seeking review via successive petitions who wait longer than other appellants should not have their federal limitation period tolled during the excess time.

ARGUMENT

I. Open-ended tolling in the intervals between state review stages would defeat the central purpose of the statute, giving dilatory petitioners the benefit of delays of their own making.

Many times in the years preceding 1996, Congress considered whether to enact a statute of limitations for habeas cases. See *Lonchar* v. *Thomas*, 517 U. S. 314, 333-334 (1996) (80 bills in 1986-1995). In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress finally adopted 28 U. S. C. § 2244(d):

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

Reduction of unnecessary delay has been a pivotal part of habeas corpus reform throughout its lengthy legislative history. The Powell Committee's report to the Judicial Conference in 1989 proposed habeas reform in capital cases. The committee noted that reform was needed to cure the "piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law." Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (1989), *reprinted in* 135

Cong. Rec. 24,694 (1989). The committee identified serious problems with the system of collateral review that it broadly categorized as "unnecessary delay and repetition." *Id.*, at 2. A prisoner had "no incentive to move the collateral review process forward until an execution date is set." *Id.*, at 3. The committee concluded that any serious reform proposal "must address the problems of delay and repetitive litigation." *Id.*, at 4.

In 1989-1990 Congress considered the Committee's proposal, including a limitation period of six months for capital cases in qualifying states, with the filing period commencing upon the appointment of counsel or a refusal of the offer of counsel. This proposal tolled the six-month period during the pendency of all state court proceedings. See S. 1760, 101st Cong., 1st Sess., proposed 28 U. S. C. § 2256 (1989), *reprinted in* 135 Cong. Rec. 24,696 (1989). In discussing the proposal's intent, insofar as capital cases are concerned, Justice Powell stated, "The point of the180 day filing requirement is to prompt capital defense attorneys to formulate a habeas petition. Otherwise, in a capital case, there is literally no incentive to file a habeas corpus petition until it becomes absolutely necessary. If a capital defense counsel works diligently from the day of appointment, he or she will get the state habeas petition filed with time to spare." Habeas Corpus Reform: Hearings Before the Senate Committee on the Judiciary on S. 88, S. 1757, and S.1760, 101st Cong., 1st & 2d Sess., S. Hrg. 101-1253, Ser. No. J-101-49, 114 (1991).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitation for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995). It also added a statute of limitation for all habeas cases, not just capital cases in qualifying states. This limitation began upon finality of

direct review, and tolled the limitation "during the pendency of a properly filed application for State review . . . ." *Id.*, at 2. This was substantially the limitation later incorporated into the AEDPA.

The plain purpose of the limitations statute was stated in the committee report for the House version.

> "[T]he bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. . . . ¶ To help accomplish [this] purpose, the bill imposes periods of limitation on federal habeas corpus petitions filed under 28 U. S. C. section 2254 . . . . This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner *diligently pursues state remedies* and applies for federal habeas review in a timely manner." H. Rep. No. 104-23, *supra*, at 9 (emphasis added).

Imposition of a statute of limitations on the filing of state prisoner petitions in federal court was considered an "essential ingredient" to any habeas reform legislation in the Congressional discussion leading up to AEDPA's enactment. See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing before the Committee on the Judiciary, United States Senate, S. Hrg. 104-428, 104th Cong., 1st Sess., 28 (1995) (statement of California Attorney General Dan Lungren). "One year for general habeas and 180 days for capital habeas, with tolling periods; that is, periods where you don't count the time while they are going through State review or State collateral review." *Id.*, at 74. Similarly, Gale Norton, Attorney General of Colorado said, "The first major reform is the creation of a statute of limitations for all habeas petitions. Statutes of limitations and time deadlines are common throughout the law, and applying them to habeas petitions is long overdue." *Id.*, at 59. James S. Gilmore, Attorney General of Virginia, noted "the single, most helpful thing the Congress could do to assist . . . in reducing the delay in capital cases is to

impose the filing deadlines . . . that I know you are considering." *Id.*, at 202.

In formulating the final version of the act, Congress was also cognizant of the suffering of victims' families and friends and sought to cure the painfully traumatic practice of setting an interminable series of execution dates in order to compel capital prisoners to move to the next level of review. Texas Attorney General Dan Morales summarized these concerns, "Establishing statutes of limitations for the filing of Federal habeas applications . . . serves both to streamline litigation and to alleviate the pain of victims' families and friends, who under the current system endure an endless series of execution dates set *only to compel the inmate to move to the next stage of litigation*." *Id.*, at 34 (emphasis added).

While the problem was most acute in capital cases, Congress did not limit the statute to such cases. It deliberately included the one-year limitation period in Chapter 153, applicable to all habeas cases. The statute serves the purpose of pushing the petitioner along through each stage of review until the federal habeas petition is filed. At that point, the federal courts can conduct their review. After conclusion of the first federal petition, the strict limitations on successive petitions, see 28 U. S. C. § 2244(b)(2), will preclude further federal review in all but the rarest cases. Pushing the petitioner to file each stage thus moves the case along to something approaching true finality.

AEDPA's undisputed purpose is to promote "the principles of comity, finality and federalism." *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). The one-year limitation period of § 2244(d)(1) "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal review." *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 262-263, 121 S. Ct. 2120, 2128 (2001). Section 2244(d)(2) specifically "promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments." *Id.*, 150 L. Ed. 2d, at

262, 121 S. Ct., at 2127. It also "balances the interests served by the exhaustion requirement and the limitation period." *Id.*, 150 L. Ed. 2d, at 263, 121 S. Ct., at 2128. Finally, the section serves the important function of "protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Ibid.* The Ninth Circuit's view destroys this careful balance. Instead, its open-ended tolling eliminates any semblance of finality and, consequently, defeats the central purpose of the statute.

Filing of habeas applications in state courts has long been a prerequisite to federal habeas. See 28 U. S. C. § 2254(b) (exhaustion rule). It would be unfair to penalize petitioners for their time spent exhausting state court remedies. For this reason, Congress included the tolling provision to insure that the Federal courts would remain accessible to the diligent petitioner. Curtailment of delay in pursuit of post-conviction remedies was a driving force behind the AEDPA legislation. It is unlikely that Congress would enact open-ended tolling that renders the one-year limitation period superfluous and ineffectual.

The limitations period serves important policy interests in the curbing of unnecessary delay by timely presentation of claims. However, Congressional intent does not include punishing petitioners for delays *beyond their control*. During the 1995 Senate Committee hearings, in response to Senator Biden's question regarding possible time limits on when petitions must be filed, Attorney General Lungren answered:

> "The general limitation period of 1 year and the Powell Committee provision both contain tolling provisions which will extend the filing deadlines. This is not meant to be a criticism in that we all agree that the petitioner should not be punished for *delay beyond his or her control*." Federal Habeas Corpus Reform, S. Hrg. 104-428, *supra*, at 146 (emphasis added).

Any argument for a lenient interpretation of "pending" based on policy must necessarily be limited to what is necessary to protect the *diligent* petitioner from circumstances beyond his control. An interpretation that rewards the dilatory petitioner for delays of his own making would be contrary to the purpose of the statute.

II. No proceeding is "pending" in the period between successive petitions, even if the second petition has a *de facto* appellate function.

The present case does not involve an appeal from the denial of state habeas. Instead, it involves three state habeas petitions, filed in the trial, intermediate appellate, and state supreme courts, respectively. Analysis of the case must begin with the procedure actually invoked in the case.

The traditional rule in both English and in American courts was that an order denying habeas relief is not appealable, absent a statute authorizing such an appeal. The petitioner could instead file another application with another court. See W. Church, Habeas Corpus § 386, pp. 570-571 (2d ed. 1893); *id.*, § 389, at 580. Throughout most of the nineteenth century, this Court's review of the decision of lower courts in habeas matters was accomplished through successive original petitions in this Court. See *Ex parte Yerger*, 8 Wall. (75 U. S.) 85, 97-100 (1869) (discussing cases to that point).

By the late nineteenth century, statutes allowing appeals were the clear trend. See Church, *supra*, § 389g, at 601-602. Yet the California Legislature has not authorized such appeals, and the traditional rule remains in force. The defendant cannot appeal a denial of habeas relief by the superior court and must file a new petition with a higher court. See *People* v. *Gallardo*, 77 Cal. App. 4th 971, 985-986, 92 Cal. Rptr. 2d 161, 171 (2000); 6 B. Witkin & N. Epstein, Cal. Criminal Law, Criminal Writs § 80, p. 611 (3d ed. 2000). This new petition is a successive habeas petition. It is not, of course, subject to the

restrictions on successive petitions at the same level, presenting repetitive or piecemeal claims. *In re Clark*, 5 Cal. 4th 750, 767, n. 7, 855 P. 2d 729, 740, n. 7 (1993).

With appeals, there is some ambiguity as to whether the filing of the appeal is the commencement of a new case. Compare *Slack* v. *McDaniel*, 529 U. S. 473, 482 (2000), with *Mackenzie* v. *A. Engelhard & Sons Co.*, 266 U. S. 131, 142-143 (1924). With successive petitions, there is none. This can be seen clearly from the fact that the successive petition in the higher court is not necessarily limited to review of the issues considered in the lower court. The statute expressly contemplates addition of new issues. See Cal. Penal Code § 1475.

To be sure, this Court did hold in *Yerger* that review through a successive petition was an exercise of appellate jurisdiction. See 8 Wall., at 102-103. That was a stretch made necessary by the peculiarities of this Court's constitutional jurisdiction, *i.e.*, the *Marbury* problem. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75, 100-101 (1807) (distinguishing *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175 (1803)); but see *id.*, at 104-105 (Johnson, J., dissenting). In other jurisdictions where this was not an obstacle, the *de facto* review via a successive petition was understood to be original and not appellate jurisdiction. See Church, *supra*, § 389g, at 601.

In *Yerger*, the term "appellate" in Article III of the Constitution was stretched to accommodate the imperative necessity of full habeas review, given the importance of freedom from illegal detention in our system of constitutional values and the role of habeas corpus in enforcing that freedom. See 8 Wall., at 95-96. Similarly, in *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994), the concept of when a habeas corpus proceeding is "pending" within the meaning of 28 U. S. C. § 2251 was stretched nearly to the breaking point because of the perceived necessity to avoid execution of a capital defendant before counsel could prepare a habeas petition. Absent such compelling considerations, this Court has refused to stretch statutory language, has turned aside diffuse claims of "unfairness," and

enforced the habeas statutes as written, including the very statute at issue here. See *Duncan* v. *Walker*, 533 U. S. 167, 150 L. Ed. 2d 251, 263-264, 121 S. Ct. 2120, 2129 (2001).

Nothing in the statutory language requires or even suggests that a successive petition is "pending" in the interval between its filing and the dismissal of the prior petition by a lower court. "Pending" means "[r]emaining undecided; awaiting decision." Black's Law Dictionary 1154 (7th ed. 1999). A case cannot be considered remaining undecided when it has been decided and there is no appeal, merely because the decision is not res judicata and the issue may be redecided in another proceeding. If such a gap-covering mechanism is to be created, it can only be as a stretch of statutory language to cover a perceived necessity or to implement an unexpressed intention of Congress. If such a stretch is to be made, *amicus* submits that the Court should recognize it as such and stretch no further than the exigency requires.

The Ninth Circuit believed that its approach was necessary to "permit state courts to address the merits of the petitioner's claim." *Saffold* v. *Newland*, 250 F. 3d 1262, 1267 (2001). Tolling the limitation period between successive petitions is not necessary for this purpose. The petitioner himself has the ability to get his case before the state courts in a timely manner. He need only file his Superior Court petition within ten months of finality on direct review. Even if there is no tolling in the gaps at all, he would still have as much time as appellants have to file in the state Court of Appeal. See Cal. Rules of Court 2(a) (60 days from notice). If denied there, he has the same right as any other appellant to file a petition for review with the California Supreme Court, rather than a new original petition as Saffold chose to file. See Cal. Penal Code §1506. If he runs out of time, it is the result of his own delay.

Another reason asserted for unlimited tolling in the gaps is that failure to toll would force the petitioner to file a premature federal petition before exhaustion to preserve his eventual federal review. See *Saffold*, 250 F. 3d, at 1267. For the reasons

just noted, the diligent petitioner is not forced to do so. To implement the purpose of the statute to push petitioners along to each stage, see *supra*, at 9, the dilatory petitioner should not be permitted to do so. Instead, *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982) should be applied to dismiss any such attempt to do an end run around the statute.

In part IV, *infra*, we will propose a rule that is congruent with the purpose of the statute and more than sufficient to meet the legitimate needs of diligent petitioners. First, though, it is necessary to dispose of a red herring in the Ninth Circuit's opinion in the present case.

III. Whether a state court waives a state timeliness rule has no bearing on when a petition is "pending" for the purpose of § 2244(d).

In the present case, habeas petitioner Saffold waited four and one-half months between denial of his second petition by the state Court of Appeal and filing of his third petition in the California Supreme Court. See *Saffold* v. *Newland*, 250 F. 3d 1262, 1266 (CA9 2001). The Ninth Circuit interpreted the California Supreme Court's disposition of this petition as addressing the merits, and it further concluded that this disposition meant that the tolling period included the entire gap. See *id.*, at 1267-1268. In so concluding, the court conflated the statute of limitations with the doctrine of adequate and independent state grounds. "We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation." *Id.*, at 1267. This is a *non sequitur*. The two rules have entirely distinct bases, and equating the two is fundamentally erroneous.

On direct review, a state-court holding on an adequate and independent state ground negates the basis of this Court's jurisdiction. That is, if the questions this Court has jurisdiction to review under 28 U. S. C. § 1257(a) have no effect on the

outcome, then there is no federal question to support jurisdiction. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992) (procedural default is jurisdictional on direct review). On habeas, procedural default is not jurisdictional, but it is still based on the adequacy of the state ground to support the judgment. See *Harris* v. *Reed*, 489 U. S. 255, 260-262 (1989). A prisoner in custody under the authority of a state court judgment is not in custody in violation of the Constitution, see 28 U. S. C. § 2254(a), if he has forfeited his attack on the judgment. See *Brown* v. *Allen*, 344 U. S. 443, 485-487 (1953).

The new statute of limitations has nothing whatever to do with the basis of the state court's denial of relief. Timely filing of the federal petition is an independent prerequisite for federal habeas relief enacted by Congress as a matter of federal law. The fact that the state may have a more generous rule and may consider on the merits petitions that Congress has barred from federal court cannot and does not lower the federal bar.

If Congress had only wanted to bar in federal court those claims that were untimely under state law, it would have done so by strengthening the procedural default rule. However, the AEDPA actually made few changes to the law of procedural default. AEDPA codified, at least in part, the rule of *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992), see 28 U. S. C. § 2254(e)(2); *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000), but otherwise left the law regarding state procedural defaults largely intact. Instead, Congress enacted the new statute of limitations with the full knowledge that it will bar from federal court claims that may be considered on the merits in state court.

In a state which does not have a statute of limitations on habeas petitions, it is entirely possible for a petition filed more than 12 months after finality on direct review to be considered on the merits. See, *e.g.*, *In re Walker*, 10 Cal. 3d 764, 774, 518 P. 2d 1129, 1134 (1974) (over 20 years; facts proffered for delay disputed; claim unsupportable on the merits); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 20-22 (discussing propriety

of denying on the merits claims which are arguably defaulted but clearly meritless). Congress could have authorized federal review of such claims by starting the clock at the time of exhaustion of state remedies, and indeed such a limitation was initially proposed by the same Senators who later sponsored AEDPA. See S. 3, 104th Cong., 1st Sess., § 508(a) (1995) ("The limitation period shall run from . . . the date on which State remedies are exhausted . . ."). Congress decided to scrap this language and instead start the clock on the date of finality and stop it during the actual pendency of state collateral review. The important difference in the two approaches is that the petitioner's own delays in initiating state proceedings count against his federal deadline *regardless* of whether the state and its courts choose to excuse them for the purpose of state collateral review. The prisoner who waits 13 months to initiate state habeas will clearly be barred from federal habeas, even though the state courts may consider his petition timely and address the merits.

The reasons why Congress chose to deal with delay through a statute of limitations rather than a beefed-up default rule are not difficult to see. Procedural default is a murky area of the law. It requires federal-court evaluation of whether state laws are "adequate" and "independent" under standards that remain unclear after many decades of litigation. See CJLF *Lee* Brief, at 5-10; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Stewart* v. *Smith*, No. 01-339, pp. 3-5.

Further, as the present case illustrates, a rule that depends on interpretation of the state court disposition creates perennial difficulties. In the procedural default area, this Court's precedents lay down some rules and presumptions, but the results have been less than fully satisfactory. *Michigan* v. *Long*, 463 U. S. 1032, 1040-1041 (1983) created a presumption of disposition on federal grounds in certain direct review cases. That presumption causes little harm on direct review, since, if the presumption turns out to be incorrect, the state court can

always reassert the state ground on remand. See, *e.g.*, *Commonwealth* v. *Labron*, 547 Pa. 344, 345, 690 A. 2d 228, 228-229 (1997). On habeas, though, there is no remand, and valid judgments that actually rest on independent state grounds are routinely overturned based on a presumption that is doubtful to begin with and easily misapplied. Ten years after *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) and twelve years after *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989), we still regularly see decisions such as the Ninth Circuit's opinion in the present case, brushing aside the state supreme court's clear statement of both the procedural default and the merits as alternative grounds. See *Saffold*, 250 F. 3d, at 1267. The real and fabricated interpretive difficulties with independent state grounds should not be exported to the statute of limitations, where the basis of the rule does not require interpretation of the state decision.

Worst of all, procedural default law as applied by the Ninth Circuit creates a perverse incentive for states to adopt severe default rules with narrow or no exceptions. In *In re Robbins*, 18 Cal. 4th 770, 811-812, and n. 32, 959 P. 2d 311, 338-339, and n. 32 (1998), the California Supreme Court clarified and arguably narrowed its "error of constitutional magnitude" exception in evident response to the Ninth Circuit's dubious decision in *Siripongs* v. *Calderon*, 35 F. 3d 1308 (1994). Decisions such as the present case may be expected to result in further curtailment of delayed petitions, either through case law, rule of court, legislative statute, or initiative, if that is the only way to have the federal limitation meaningfully implemented. Cutting off state and federal remedies in one swoop would not be to the benefit of habeas petitioners generally, but it is the natural consequence of a line of decisions that punishes states for generosity.

The principal advantage of a statute of limitations over a "delayed petition" rule is clarity. Shortly before enactment of the AEDPA, *Lonchar* v. *Thomas*, 517 U. S. 314, 326-327 (1996) held that even a multi-year delay did not authorize

dismissal without a showing of prejudice, a nebulous requirement at best, and noted the debate over the appropriateness of such a rule. *Id.*, at 328. That debate concluded with the enactment of § 2244(d).

Clarity in deadlines serves the interest of both the prisoner and the state. The prisoner knows when he must get his papers in. The state knows when its judgment is truly final. The Ninth Circuit's approach robs the state of its finality and simultaneously sets a trap for the prisoner. By false analogy to independent state grounds, an untimely successive petition tolls the statute during the gap period if and only if the state court accepts the untimely filing or if its rejection for untimeliness somehow lacks adequacy or independence. This is not known or knowable to the petitioner at the time when the clock may or may not be running.

The Seventh Circuit called this the "Cheshire cat-like quality" of the *Saffold* approach. *Fernandez* v. *Sternes*, 227 F. 3d 977, 980 (2000). Whatever it is called, it is inimical to the clarity and certainty that a statute of limitations should provide. The complexity and confusion of the independent state grounds doctrine should not be imported into the statute of limitations. State courts can and should accept or reject untimely filings in the exercise of whatever discretion state law gives to them. Their orders should be summary dispositions or full opinions according to the needs of the case and the state judicial system, and not with a glance over the shoulder to federal habeas. Cf. *Coleman*, 501 U. S., at 738-739 (declining to "tell state courts how they must write their opinions"). The state court's decision to accept or reject an untimely petition should have no bearing on whether the federal limitation clock was ticking in the interim.

IV. Any "tolling in the gaps" between stages of state collateral review should be limited to a definite state time limit, whether directly applicable or "borrowed."

For the reasons discussed in part II, *supra*, any tolling in the intervals between successive petitions in California can only be based on inference of the policy Congress intended and not on the wording of the statute or the common understanding of a proceeding being "pending." If such tolling is to be allowed, it must be limited in duration so as to effectuate and not defeat the purpose of the statute.

Any inference of Congressional "intent" on this point must be made with the understanding that the members of Congress who voted for this Act probably did not think about the precise problem at all. Cf. *Beecham* v. *United States*, 511 U. S. 368, 374 (1994) (noting that determining what legislators would have thought about a particular case is a "hopeless" task). *Amicus* has found no indication in the legislative history that the issue even came up. When Congress specified tolling while a state proceeding was "pending," its members probably envisioned state systems similar to the system for federal prisoners under 28 U. S. C. § 2255. Under that system, there is a fixed and relatively short time for appeals in the normal course of procedure. See Fed. Rule App. Proc. 4(a)(1)(B) (60 days when U. S. is a party); Rule 11 of the Rules Governing Section 2255 Proceedings in the United States District Courts ("§ 2255 Rules") (adopting FRAP 4(a)). If the petitioner is unsuccessful on appeal, the time to seek certiorari review in this Court is also definite. See 28 U. S. C. § 2101(c); *Heflin* v. *United States*, 358 U. S. 415, 418, n. 7 (1959).

We can also draw some inferences about the meaning of "pending" from cases on 28 U. S. C. § 2251 and its predecessor. The predecessor statute provided an automatic stay of state proceedings "against" the petitioner while the federal "proceedings or appeal" were "[p]ending." See *In re Jugiro*, 140 U. S. 291, 295 (1891) (quoting Rev. Stat. § 766). In *Rogers* v. *Peck*, 199 U. S. 425, 427 (1905), the governor granted a reprieve

immediately after the federal District Court denied relief, to give the petitioner time to appeal. The petitioner then ungratefully attacked this action as violating the automatic stay. This Court rejected the argument on the ground that the action was not "against" the petitioner, not on the ground that no proceeding was pending. See *id.*, at 437. *Rogers* could be read to imply that a proceeding was pending in the interval. But see *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) (no precedent established for questions which are not discussed but "merely lurk in the record").

Jugiro addressed the meaning of "pending" regarding a much more attenuated possibility of further proceedings. In that case, the state court set a new execution date a week after this Court's decision on the first habeas petition, without waiting for the mandate to issue. See 140 U. S., at 292. Jugiro claimed this action was void because the first habeas proceeding was still pending. See *id.*, at 294-295. The Court rejected the argument, holding that "the appeal . . . was no longer pending," *id.*, at 295, notwithstanding the possibility that the Court might yet "suspend or set aside its own judgment." *Id.*, at 296.

From these cases we can infer a principle that a case may be considered pending when further review remains available in the normal course of procedure, *i.e.*, via a timely petition or notice of appeal, but that the mere possibility of further review, such as rehearing in the rendering court or allowance of an untimely petition, does not keep "pending" an otherwise final case. As applied to a system like that governed by Federal Rules of Appellate Procedure 4(a), a case would be pending during the normal time of subdivision (1) or during the actual consideration of a motion under subdivisions (5) or (6), but the mere possibility that a motion could be filed under subdivisions (5) or (6) would not keep an action pending until the motion is actually filed.

The difficult question arises when "timely" and "untimely" are not precisely defined intervals but instead are matters of

judgment. *Amicus* suggests that the guiding principles for this situation may be drawn from the cases involving "borrowed" statutes of limitations.

Congress often creates causes of action without specifying a statute of limitations. See *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483 (1980). It is well established that in these circumstances courts will "assume that Congress did not intend to create a right enforceable in perpetuity." *Felder* v. *Casey*, 487 U. S. 131, 140 (1988). The usual solution is to borrow the most closely analogous state statute, see *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 464 (1975), provided that a state limitation will not be adopted if it is "inconsistent with the federal policy underlying the cause of action under consideration." *Id.*, at 465.

States remain free, for the purpose of their own consideration of federal claims, to adopt open-ended rules of timeliness along the lines of Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Congress has made no attempt to preempt these rules. Cf. *Felder*, *supra*, at 138. However, these rules do not control when the clock is running for the purpose of the statute governing the subsequent filing in federal court. As discussed, *supra*, at 15, it is beyond dispute that a claim considered timely in state court may be barred from federal review for delay preceding the initial filing. By the same token, it would be inconsistent with the policy of the federal statute to permit a state's open-ended timeliness rule for the intervals between state courts to permit indefinite delay.

Amicus suggests that where state law provides no definite time period to initiate review in a higher court, the federal statute be tolled for the period prescribed by state law for the most closely analogous procedure which does have a definite limit. Where a successive petition is used as a *de facto* appeal from the trial court to the intermediate appellate court, the habeas petitioner should have as much time as regular appellants in civil cases, and no more. Cf. § 2255 Rule 11 (adopting civil case limit). The general rule in California is 60 days. See

Cal. Rules of Court 2(a). As applied to the present case, this would easily cover the gap between the Superior Court's denial of relief on June 9, 1997, and Saffold's application to the Court of Appeal only five days later.

For the next level, the proper tolling period is even more obvious. Saffold had the same right as any other unsuccessful Court of Appeal litigant to ask the California Supreme Court for discretionary review. See Cal. Penal Code § 1506.[4] For a summary denial of an original habeas petition not consolidated with the appeal, the petitioner has ten days. See Cal. Rules of Court 28(b) (10 days from finality in Court of Appeal), 24(a) (summary writ denials final immediately, with exception for habeas consolidated with appeal); *People* v. *Pendleton*, 25 Cal. 3d 371, 382-383, n. 2, 599 P. 2d 649, 656, n. 2 (1979) (finality rules, predates exception noted above); Fisher, Writs in California State Courts § 2.146, p. 321, in Appeals and Writs in Criminal Cases (CEB J. Bishop ed., 1st ed. 1982); *id.*, at 172 (1998 Supp.). This is a tight deadline, to be sure, but not an unreasonable one.

Instead of petitioning for review, Saffold waited four and one-half months and filed an original writ petition, which the California Supreme Court denied for lack of diligence as well as lack of merit. App. to Pet. for Cert. G-1. Not only did the Ninth Circuit hold that the entire period was tolled in this case, but in a subsequent case that court held that its decision in the present case required tolling the entire time for a petitioner who waited over *four years* to file a successive original petition

4. This section has not been amended since 1975. As a result, it still uses the term "hearing in the Supreme Court." The procedure was redesignated "review" in 1984. The differences between "hearing" and "review" are not pertinent to this case. See 9 B. Witkin, Cal. Procedure, Appeal § 860, pp. 895-896 (4th ed. 1997) (summarizing the change). It is discretionary review, and it is granted primarily to resolve conflicts in the lower courts or settle particularly important questions. It is functionally equivalent to certiorari in this Court. See *id.*, §§ 861, 863, at 896, 898.

raising different grounds. *Welch* v. *Newland*, 267 F. 3d 1013 (CA9 2001).[5] A rule more contrary to the purpose of this statute is difficult to imagine.

There is no reason to toll the statute any longer for one mode of review than for the other. Although filing an original petition remains a proper procedure, see *In re Clark*, 5 Cal. 4th 750, 767, n. 7, 855 P. 2d 729, 740, n. 7 (1993), the policies underlying the federal statute do not depend on the choice. The definition of "pending" may be stretched to give the prisoner who files a successive writ application *as much* time as the one who files a petition for review; there is no justification in language or policy for giving him *more* time.

When a California prisoner has been denied habeas relief by the Court of Appeal, the federal limitation period should begin running again when the time to petition for review in the California Supreme Court expires. The time should continue to run until an original writ petition has actually been filed with that court. In the present case, Saffold's 12 months had long expired by the time he filed his petition. Regardless of how the California Supreme Court's disposition of the petition is interpreted, Saffold did not meet the deadline established by Congress for a federal habeas petition. The District Court correctly dismissed it.

5. The Ninth Circuit has stayed its mandate in *Welch* pending this Court's decision in the present case.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

November, 2001

Respectfully submitted,

KENT S. SCHEIDEGGER
Counsel of Record
MARITZA B. MESKAN

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE

BRIEF

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In the
Supreme Court of the United States

ANTHONY NEWLAND, Warden

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

DAVID M. PORTER
Counsel of Record
Co-Chair, NACDL
Amicus Committee
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Of Counsel

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned because reversal of the Ninth Circuit's decision will adversely affect hundreds of pro se habeas petitioners by depriving them of any federal habeas merits review.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL or NAFD, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

SUMMARY OF ARGUMENT

1. With all due respect to the parties and the courts below, it appears to us that the issue has not been properly framed. Respondent Saffold's conviction became final long before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) and its new statute of limitation on federal habeas corpus petitions. Application of the limitation period to habeas corpus petitioners such as Mr. Saffold violates the Constitution's Due Process Clause, as circuit courts have unanimously held. Accordingly, the courts have crafted a "grace period" within which such petitioners can file their federal habeas petitions. The AEDPA tolling provision, 28 U.S.C. § 2244(d)(2), by its express terms, applies only to the limitation period "under this subsection," i.e., the limitation period set forth in section 2244(d)(1), not the judicially created grace period, and therefore does not apply, as such, to this case.

It is incorrect, we submit, to attempt to resolve this case by parsing the precise terms of section 2244(d)(2) to divine what Congress intended by the word "pending" in

that statute, because section 2244(d)(2) does not apply to this case. It is not entirely irrelevant, however, because in determining what is a "reasonable time" under the grace period, this Court should take into account the policy considerations that led Congress to enact the tolling provision. As this Court stated in *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 2127-28 (2001), the tolling provision is intended, in large part, to promote the exhaustion of state remedies. Accordingly, we submit that a reasonable time for filing a federal petition for prisoners whose convictions became final before the AEDPA is a one-year period from the AEDPA's enactment date, but excluded from that period should be the time reasonably necessary to exhaust state remedies with respect to federal claims affecting the judgment attacked by the federal habeas petition, and then to prepare and file a federal habeas corpus petition. This rule promotes federalism, comity, and finality, without depriving state prisoners of their right to obtain federal court review of properly exhausted federal questions about the validity of their convictions and sentences.

2. For the reasons discussed under Point 1 of this Brief, or for those advanced by the respondent, this Court should affirm the judgment of the court below. If the Court reverses the judgment, however, then any rule it announces that is less favorable than that heretofore adopted by the circuits should be applied prospectively only. In a line of cases extending from *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to *Ryder v. United States*, 515 U.S. 177 (1995), this Court has recognized that retroactive application of newly announced constructions of statutes of limitation can produce "grave disruption or inequity." *Id.* at 184. A decision in favor of the Warden would overrule clear precedent of the lower courts,

impair the purposes that the habeas corpus statute is designed to protect, and be manifestly inequitable. This case thus satisfies the factors articulated in *Chevron Oil* to justify a purely prospective application of any rule the Court may announce that would be adverse to the interest of prisoners who exhausted their state remedies and then filed a federal habeas corpus petition in good faith reliance on a fair construction of the AEDPA, under the developing case law of the lower federal courts.

ARGUMENT

I.

The Decision of the Court Below Should Be Affirmed On the Ground that Mr. Saffold Filed His Federal Habeas Petition Within a Reasonable Time Under the

§ 2241(c)(1)-(4); *Lackawanna County Dist.Attorney v. Coss*, 532 U.S. 394, ___, 121 S. Ct. 1567, 1573 (2001).

In non-capital cases, practical considerations also counseled against a delay in challenging one's conviction. As time passes, memories may fade, witnesses may die or become difficult to locate, documents may be lost. Petitioners have the burden of proof to establish their entitlement to habeas relief, and face various adverse presumptions (*e.g.*, 28 U.S.C. § 2254(d)); thus, delay was ordinarily not in prisoners' practical interests. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 5 ("[i]In contrast [to capital habeas petitioners], prisoners serving an ordinary term of years have every incentive to bring their claims

properly filed state post-conviction petition for post-conviction relief is "pending." The limitation provision and tolling provision work in tandem; the former promotes the interest of the finality of state court judgments by establishing an explicit time period within which to file a federal petition, against which the latter balances the interests of federalism and comity underlying the requirement that petitioners exhaust their claims in state court before filing their federal petition. *Duncan v. Walker*, 533 U.S. 167, ___- ___, 121 S. Ct. 2120, 2127-28 (2001).

In cases such as Mr. Saffold's, however, where the statute of limitation, as set forth in 28 U.S.C. § 2244(d)(1), had expired prior to the enactment of the AEDPA, the statute cannot be applied because it would violate the Due Process Clause of the Fourteenth Amendment. "The

This judicially created grace period is consonant with a long line of precedent of this Court. *See Texaco v. Short*, 454 U.S. 516, 527 n.21 (1982); *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902); *Terry v. Anderson*, 95 U.S. (5 Otto) 628, 632-633 (1877); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 599-600 (1873).

The parties herein and the lower courts proceeded on a fundamentally flawed assumption that this case hinges on a precise and literal interpretation of the statutory tolling provision. That provision applies, by its express terms, only to the limitation period "under this subsection," 28 U.S.C. § 2244(d)(2), *viz.*, the limitation period set forth in section 2244(d)(1). As discussed above, that limitation period cannot constitutionally be applied to this case. Instead, this case is governed by a "grace period" -- a judicially devised equitable doctrine applied

As noted above, the circuit courts have unanimously held that one year is a "reasonable" amount of time for the grace period. *See, e.g., Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) ("Section 2244(d) is short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce"), *rev'd on other grounds and remanded*, 521 U.S. 320 (1997). The rule cannot end there, however. Because this Court requires prisoners to first exhaust their claims in state court, the grace period must also accommodate the exhaustion doctrine. *Cf.* 28 U.S.C. § 2244(d)(2). This Court should hold, therefore, that for prisoners whose convictions became final before the AEDPA's enactment, a federal habeas petition will be considered timely if filed within a one-year period after April 24, 1996. Excluded from that one-year grace period should be the time reasonably necessary to exhaust state remedies with respect to federal claims affecting the judgment attacked by the federal habeas petition, and then to prepare and file a federal habeas corpus petition.[2] *See O'Sullivan v.*

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2. Habeas petitioners should also be afforded a reasonable period of time, after receiving notice from the state's highest court of the denial of the state application, to filing a federal habeas petition. We suggest the Court adopt the thirty-day period from Rule 4(a)(1)(A), Federal Rules of Appellate Procedure, given the civil nature of habeas corpus, and the parity of direct appeal and habeas corpus review. *See* 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4b (4th ed. 2001).

This is not to suggest, however, that the prisoner's state post-conviction application does not remain "pending," for post AEDPA cases actually governed by

Boerckel, 526 U.S. 838 (1999) (requiring habeas petitioners to present claims to states' highest courts).[3]

Applying this rule to the facts of this case, one must conclude that Mr. Saffold's federal habeas petition was timely filed. While he did not file his federal petition on or before April 24, 1997, he had by that time filed a state application challenging his conviction. His federal petition was filed only eight days after the state's highest court denied his state application.

We have no quarrel with the Warden's position that it is the Court's task is to construe what Congress has enacted and that examination of the language of "'the statute'" is where such task begins. Petitioner's Brief at 21 (quoting *Walker*, 533 U.S. at ___, 121 S. Ct. at 2124). The Warden proceeds immediately to parse the tolling provision, and it is here that we part company. The tolling provision applies, by its express terms, only to the "period of limitation *under this subsection*." 28 U.S.C. § 2244(d)(2) (emphasis added). This Court's task begins, therefore, with examination not of the tolling provision but of the limitation provision. As discussed above,

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section 2244(d)(2)'s terms, for the additional time during which certiorari could be sought, or if sought remains before this Court. The better construction of section 2244(d)(2) does continue the tolling for that additional time.

3. Excluding the time required to exhaust remedies also respects Congress' view, expressed in section 2244(d)(2), that it is reasonable to toll the statute of limitation – in cases to which it applies – while claims are being presented to the state court.

because the Constitution prohibits the narrow application of the limitation provision to this case, the exact words of the statutory tolling provision are not controlling.

II.
If this Court Holds that the Tolling Provision Applies and that the Time Between a State Court's Decision Denying a Post-Conviction Application and the Filing of a Subsequent Application Is Not Tolled from the Limitation Period, the Holding Should Be Applied Prospectively Only Because It Would Overrule Clear Precedent, Contradict the Purposes of the Habeas Corpus Statute, and Be Manifestly Inequitable In This Case.

Even if this Court were to reverse the judgment of the court below, it should declare its ruling to be prospective only.[4] A long line of cases, beginning with *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), has refused to apply newly-specified statutes of limitation retroactively to bar suits that, under controlling precedent, were otherwise filed in a timely manner. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761-62 (1995) (Kennedy, J., concurring) (noting " long tradition of judicial authority to formulate rules ensuring fair and predictable enforcement of statutes of limitations, for instance, through rules pertaining to tolling or waiver"); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v.*

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4. If the Court holds that the tolling provision applies, we believe Mr. Saffold's construction of the statute best effectuates its plain meaning and promotes the principles of comity, finality, and federalism that underlie the AEDPA. The argument set forth in the text in Section II is presented in the alternative.

Gilbertson, 501 U.S. 350, 370 (1991) (O'Connor, J., dissenting); *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).[5] Because a ruling in Petitioner's favor would meet all three of the so-called "*Chevron Oil* factors," it should be applied – if it is to be applied at all – prospectively.

In *Chevron Oil*, the issue was whether a federal or state statute of limitation applied to the plaintiff's cause of action. This Court held that the state statute of limitation applied, but it noted that because the plaintiff filed his suit in compliance within the then-prevailing federal statute of limitation, it "must consider the [plaintiff's] argument that the state statute of limitations should be given nonretroactive application." 404 U.S. at 105. The Court considered three "separate factors:"

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed

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5. While the majority opinion in *Ryder v. United States*, 515 U.S. 177, 184 (1995), may have cast a cloud over the "continuing validity" of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), and *Reynoldsville Casket Co.*, 514 U.S. 749, it acknowledged that "grave disruption or inequity involved in awarding retrospective relief" might "bring [the *Chevron Oil*] doctrine into play." *Id.* at 184. As discussed below, retroactive application would result in precisely such grave inequities.

> that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-07 (citations and internal quotations omitted).

After noting that its holding overruled a long line of circuit decisions, the Court held that it would be "anomalous indeed" to bar the plaintiff's lawsuit retroactively. "A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." 404 U.S. at 107-08 (citation omitted). The Court reasoned that the plaintiff could not have "slept on his rights" at a time when he could not have known the time limitation that the law imposed on him. It concluded that the right to recover for allegedly serious injuries that "may significantly undercut [the plaintiff's] future earning power" was entitled to the protection of nonretroactive application, which "here simply preserves his right to a day in court." 404 U.S. at 108.

In this case, the first *Chevron Oil* factor is plainly met – as the Warden forthrightly acknowledges, his proposed interpretation of "pending" is at odds with "the line of circuit court cases providing for tolling during the gaps between tiers of state collateral review." Petitioner's Brief at 8. Indeed, every circuit to have considered the issue appears to have rejected "the gap theory."[6] A ruling in the Warden's favor, therefore, would *both* "overrul[e] clear past precedent on which litigants may have relied," and "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106.

Similarly, the second *Chevron Oil* factor – whether retroactive application would be inconsistent with the purpose of the underlying statute – militates sharply in

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6. *See* Petitioner's Brief at 40-46 (citing *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001); *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000); *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321 (10th Cir. 1999); *Peterson v. Gammon*, 200 F.3d 1202 (8th Cir. 2000); *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000); *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000); *Melancon v. Kaylo*, 259 F.3d 401 (5th Cir. 2001). To this list should be added the decisions in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 4 (2000), *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001), petition for cert. filed (Oct. 5, 2001), *Taylor v. Lee*, 186 F.3d 557, 560-61 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000), and *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000). The only authority in the nation for "the gap theory" is a lone district court in the Second Circuit. *See Robinson v. Ricks*, 163 F. Supp. 2d 155 (E.D.N.Y. 2001).

Mr. Saffold's favor. In a description both simple and eloquent, this Court explained that the purpose of the Great Writ is "to examine the legality of the commitment" and "to liberate an individual from unlawful imprisonment." *Ex parte Watkins*, 28 U.S. 193, 202, 203 (1830). It is a remedy that "has been for centuries esteemed the best and only sufficient defense of personal freedom," which, if withdrawn, "risk[s] injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (internal quotations omitted).

There can be no question that this important interest in human liberty is at least on par with other rights and legal interests this Court has found deserving of protection against retroactive divestiture: *viz.*, the property interests of cities, bondholders and others connected with municipal utilities, *Cipriano v. Houma*, 395 U.S. 701 (1969); the integrity of elections, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); a state's taxation of highway use, *American Trucking Ass'ns, Inc.*, 496 U.S. 167; a State's ability to make available to its employees annuities of sex-based pension plans offered by insurance companies on the open market, *Florida v. Long*, 487 U.S. 223 (1988); the right to be free of racial discrimination in applying for tenure, *Saint Francis College*, 481 U.S. 604; the right to have non-Article III judges determine non-core issues in bankruptcy proceedings, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opn.); the authority of a police officer to initiate further conversation with an accused after the latter has invoked his right to counsel, *Solem v. Stumes*, 465 U.S. 638 (1984).

Finally, the last and most important *Chevron Oil* factor examines whether "injustice or hardship" can be

avoided by a holding of nonretroactivity. This factor weighs most heavily in favor not only of Mr. Saffold but also hundreds of other habeas petitioners who relied in good faith on this Court's assurance that as long as they properly exhausted their claims in state court, the federal habeas court would consider the merits of their claims, unless they were denied by the state court on independent and adequate state grounds. First, application of an adverse decision to Mr. Saffold would produce a substantially inequitable result given the fact that, acting *pro se*, he proceeded with appropriate (indeed astounding) alacrity in litigating his post-conviction petition through the state courts and in filing his federal petition. It is undisputed that he delivered to prison authorities his petition to the state trial court before the one-year grace period expired, and that he delivered his petition to the state appellate court only *five days* after the superior court denied the petition. *See* Petitioner's Brief at 4. While the Warden describes Mr. Saffold as "*waiting* over four and one-half months," Petitioner's Brief at 5 (emphasis added), after the denial of his habeas petition in the appellate court before filing a petition in the state's high court, according to Mr. Saffold's unrebutted declaration, he did not receive word of the appellate court's denial until November 10, 1997, Pet. App. A-9; J.A. 79, and he delivered his petition for the high court *the very same day*. J.A. 78. Eight days after the high court denied his petition, he delivered his federal petition to the prison authorities. J.A. 77. This is not the case of a petitioner who "slept on his rights."

While this Court cannot become familiar with the circumstances of hundreds of other habeas petitioners who, like Mr. Saffold, sustained convictions that became final before enactment of the AEDPA and initiated state

post-conviction challenges during the one-year grace period, it cannot be denied that a substantial percentage of them relied in good faith on decisions such as *Saffold*, *Nino v. Galaza*, and others cited in note 6, *supra*, which essentially held that the statute is tolled the entire time from the filing of the first state habeas petition until the state's highest court rejects the final collateral challenge. For this group of litigants, the retroactive application of a restrictive definition of "pending" would forever bar *any* federal merits review of claims that they are being held in custody "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and would risk grave injury "to an important interest in human liberty." *Lonchar*, 517 U.S. at 324. For these reasons, any ruling adverse to Mr. Saffold should be announced on a prospective basis only.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed. In the alternative, any decision adopting a narrower interpretation of the term "pending" in section 2244(d)(2) should be applied prospectively only.

Respectfully submitted,

DAVID M. PORTER
Counsel of Record

PETER GOLDBERGER
Of Counsel